Office Supreme Court, U.S.
FILED
AUG 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962.

No. 314

JAMES R. HOFFA and ROBERT E. McCARTHY, JR.,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
CHARLES E. DAVIS,
FISHBACK, WHITAKER, DAVIS,
DOMINICK AND TROUTMAN,
170 E. Washington Street,
Orlando, Florida,
Attorneys for Petitioner James R. Hoffa,
O. B. CLINE, JR.,
1518 Alfred I. DuPont Bldg.,
Miami 32, Florida,
Attorney for Petitioner Robert E. McCarthy, Jr.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement	3
Reasons for Granting the Writ	11
Conclusion	15
Appendix:	
Notice of Motion	1a
Brief for the United States of America in Support of Motion to Dismiss Appeal	2a
Answer to Motion to Dismiss Appeal	10a
Opinion on Motion to Dismiss	25a
Petition for Rehearing and, Alternatively, a Motion to Stay Issuance of Mandate	26a
Government's Reply to Petition for Rehearing and/or to Stay Issuance of Mandate	28a
Order on Petition for Rehearing and Alternatively, a Motion to Stay Issuance of Mandate	32a

TABLE OF CASES CITED.

	Page
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949)	11, 12, 13
DiBella v. United States, 369 U. S. 121 (1962)	13
Parr v. United States, 351 U. S. 513 (1956)	11
Stack v. Boyle; 342 U. S. 1 (1951)	11, 12, 13
Swift & Co. v. Compania Caribe, 339 U. S. 684 (1950)	11, 12, 13
United States v. Hoffa, 196 F. Supp. 25 (July 12, 1961)	3
United States v. Hoffa, No. 1282 Orl. Cr., May 23, 1962	14

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Annual Report of the Director of the Administrative Office of the United States Courts 1961, p. 263	15
Insider's Newsletter	9
John Herling's Labor Letter	9
The Enemy Within, Robert F. Kennedy, 1960	7, 8
Kiplinger Newsletter	9
18 U. S. C. § 1341	3
18 U. S. C. § 1343	3
28 U. S. C. § 1254(1)	4
28 U. S. C. § 1291, as amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348	2, 11

IN THE

Supreme Court of the United States.

October Term, 1962.

No. .

JAMES R. HOFFA AND ROBERT F. McCARTHY, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 1, 1962.

OPINIONS BELOW.

The order of the District Court is unreported. The *per curiam* opinion of the Court of Appeals, also unreported, is printed at page 25a of the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 1, 1962. P. 25a, *infra*. A timely petition for rehearing was denied on July 12, 1962. P. 32a, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED.

28 U. S. C.:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

QUESTION PRESENTED.

Where, in a pretrial proceeding to determine the validity of a criminal indictment, defendants had served subpoenas on several high executive and legislative officials of the United States Government, including the Attorney General and some of his staff, and others, to establish such officers' deliberate and wilful actions designed to instigate widespread inflammatory publicity against the principal defendant for the purpose of depriving the defendants of a fair and impartial grand jury, is the order of the District Court granting Government motions to quash these subpoenas a final order, appealable under 28 U. S. C. § 1291 to the Court of Appeals?

STATEMENT.

Petitioners James R. Hoffa and Robert E. McCarthy, Jr., stand indicted in the District Court for the Southern District of Florida. They are charged with fifteen substantive counts of violations of 18 U. S. C. §§ 1341 and 1343. The indictment contains a sixteenth count charging conspiracy to violate the same provisions of the penal code.

The indictment was returned by a grand jury in Orlando, Florida, on October 11, 1961. This is the second indictment against these defendants in this district. The previous indictment, which contained twelve substantive counts, was returned by a grand jury on December 7, 1960. On motion by the defendants, strenuously opposed by the Government, this indictment was dismissed by the District Court for gross irregularities in the process for selection of the grand jury. *United States v. Hoffa*, 196 F. Supp. 25 (July 12, 1961). Despite its position in the District Court that the defendants' motion was spurious and utterly lacking in any basis whatsoever, the Government did not take an appeal from this decision.

Defendants filed motions to dismiss the second indictment and for other relief. These motions were based upon several grounds, including the contention that defendants were deprived of a fair and impartial grand jury through the conscious and deliberate instigation of propaganda hostile to defendant Hoffa by officials of the executive and legislative branches of the United States Government. The precise allegation is found in paragraph 11 of the motion to quash the indictment:

> "To dismiss the indictment on the ground that the Grand Jury which returned the indictment was neither fair, or impartial, in that:
>
> "(a) Said Grand Jury was biased and prejudiced as a result of exposure to widespread defamatory and inflammatory publicity nationally and locally through

newspapers, radio and television, prior to and during the selection of the Grand Jury, and the representation to it of the evidence against the Defendant during its deliberations.

"(b) That said Grand Jury was biased and prejudiced as a result of exposure to widespread defamatory and inflammatory publicity deliberately engendered by public statements and acts of various officials in the Justice Department and members of the Cabinet and Senate Committee, and other persons acting in concert with them, prejudicial to Defendant, prior to and during the selection of the Grand Jury, the presentation to it of the evidence against the Defendant, and during its deliberations. . . . .

"(c) The said Grand Jury was biased and prejudiced against the Defendant as a result of the statement by the President of the United States over a nationally and locally televised and radio broadcast, which was also published in local daily newspapers, when a candidate for the presidency, in substance as follows: "I am not satisfied to see men like Hoffa be free," and by the appointment of the President's brother as Attorney General of the United States, who has, on many occasions, issued public statements and writings all of which biased and prejudiced the Grand Jury."

The Government filed a Memorandum in Opposition to Defendant Hoffa's Motion to Dismiss. The entirety of the response to the charge of deliberate attempts by high Government officials to influence the deliberations of the grand jury was as follows:

"11. Paragraphs 11(a), (b), (c) and (d) of defendant Hoffa's Motion to Dismiss, attacking Counts One through Sixteen of the indictment generally on the ground that the grand jury was neither fair nor impartial, should be denied without a hearing.

> "There is an absolute failure on the part of the defendant to show that the grand jurors were in fact biased and prejudiced, and improperly indicted these defendants in disregard of their obligations and in defiance of their oaths to Almighty God."

Two observations are pertinent with respect to this pleading by the Government. The most significant is the utter failure to deny the charge of grossly reprehensible conduct. Nowhere does this response deny that high Government officials deliberately and calculatingly engendered hostile propaganda for the purpose of depriving the petitioners of a fair and impartial grand jury.

The second point to be noted is the thrust of the answer toward a failure of proof on the part of petitioners to show that the campaign of villification had succeeded.[1] Thus the Government took the position, as a matter of law, that it is all right for high Government officials to connive to deprive a person of a fair and impartial grand jury so long as he cannot prove absolutely that they had succeeded.

Not content to rely on the absence of any denial by the Government of the allegations of deliberate Government instigation of hostile publicity, petitioners prepared to prove by direct evidence that the public statements of high Government officials about the defendant were made with knowledge of the pending grand jury proceedings. Petitioners further prepared to prove that the running fire of anti-Hoffa publicity that rose to a crescendo during and immediately prior to the convening of the grand jury was deliberately instigated by Government officials.

Toward this end, sometimes with considerable difficulty, petitioners served subpoenas upon high Government officials in the present and past Administrations. In every

1. The pleading does not explain the strange inconsistency between its claim of failure of proof before a hearing and its further assertion that no hearing should be held.

case, these subpoenas sought to have the individual come and testify. In many instances, the subpoenas also sought to have the individual named bring documents or other materials with him. Subpoenas were also served upon publishers of newsletters in which had appeared much of the anti-Hoffa material with special notation that the sources were Government insiders.

Not surprisingly, the Government moved to prevent petitioners from putting the testimony of these officials on the record. A motion to quash the subpoenas was filed by the prosecutor. Private counsel followed the same course for the publishers. These motions to quash came on for a hearing before District Judge Joseph P. Leib on March 9, 1962.

The precise basis or bases for the motions to quash was never made clear. Counsel for the Government vaguely argued that the subpoenas were untimely, oppressive and irrelevant. The latter apparently stems from the Government's distorted legal view that it is all right for Government officials to mount a calculated campaign to villify a person they intend to accuse of crime. Such a campaign, in their view, is not relevant in the criminal proceeding. The meaning of "untimely" was never revealed. The same is true of "oppressive". These matters, however, go to the merits of the issues raised on this appeal and need not be explored here.

On behalf of petitioners, counsel made an offer of proof as to the testimony expected to be elicited from the persons under subpoena. It is inappropriate in this petition to set forth fully the nature of these matters. However, it is possible to give illustrations from statements of counsel to demonstrate the effort to establish the deliberate quality of the inflammatory and prejudicial running fire of publicity.

On the subpoena to Attorney General Robert F. Kennedy, counsel stated: "The Attorney General has been deliberately fomenting inflammatory publicity. . . . Mr.

Kennedy has made public statements that he wants to see Mr. Hoffa rot in jail, that he has got enough evidence to convict him" (Transcript (hereinafter Tr.) 129-130).[2] Counsel also referred to the book published by Robert F. Kennedy in 1960, *The Enemy Within*, which contains many sensationalized and unwarranted and untrue assertions about petitioner, Hoffa (Tr. 156). There was a republication of the prejudicial material from the Kennedy book in a volume called *Crusade Against Crime*, bearing the grateful acknowledgment of the publisher, for the chapter on petitioner, to the Attorney General's Administrative Assistant (Tr. 170-171, 185-188; see also Tr. 153).

On the subpoena to the Secretary of Labor, Arthur Goldberg, counsel stated: "Here is an individual and a week before the Grand Jury meets issues a statement, a public statement . . . in which he says that Mr. Hoffa, words to that effect, is not fit to be a leader upon the basis of what he has discovered in the Labor Department. . . . A short time afterwards he makes a speech to the graduating class of the Federal Bureau of Investigation agents. . . . He says the President and the Attorney General see eye to eye with me that Hoffa is no good" (Tr. 131-132).

Counsel also referred to other headlines manufactured by Secretary Goldberg when he spoke to the Transport Workers Union convention. "Goldberg told the delegates to the TWU Convention . . . that the Department had 'found on the basis of evidence adduced that the Teamsters leadership did not comport itself according to the ethical standards of the labor movement'" (Tr. 135).

Counsel further indicated that he intended to prove that Secretary Goldberg planned with the leaders of the AFL-CIO to have their convention called while the grand jury was deliberating in order to produce additional headlines hostile to Hoffa. "I will show when we get Mr.

2. A copy of this Transcript has been certified by the Clerk of the Court of Appeals for the Fifth Circuit and is part of the record before this Court.

Goldberg on the stand, I will show that he plotted with Mr. Meaney, that the convention was called at a certain time, that they had big headlines, 'AFL-CIO says Hoffa corrupt', all during this particular time when the Grand Jury was meeting" (Tr. 137).

On the subpoena to John Siegenthaler, Administrative Assistant to Attorney General Kennedy, counsel declared: "We have information and we expect to be able to prove that he has been the person who has been deliberately giving out this business to the newspapers, to the columnists, to the inside letters, to the Kiplinger" (Tr. 170). Siegenthaler is also the person who received the acknowledgment of the publisher in connection with the republication in a book, called *Crusade Against Crime*, of a chapter titled "Jimmy Hoffa vs. the F. B. I.," originally in Kennedy's *The Enemy Within* (Tr. 171).

Similar issues arise with respect to legislative officials. Subpoenas were served on Senator John L. McClellan of Arkansas; Julien Sourwine, Chief Counsel to the Senate Internal Security Subcommittee of the Committee of Judiciary; and Jerome B. Adlerman, Chief Counsel to the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations. Petitioners maintain that it was not by coincidence that, at the time the grand jury was deliberating, legislative investigations were publicly conducted in order to try to prejudice the defendants. Counsel referred to one resulting headline: "Senate group to probe union deal. Hoffa faces quiz about Reds," dated October 6, 1961 (Tr. 147). The indictment was returned October 11, 1961.

Counsel represented to the District Court: "Now, we say that they deliberately and viciously and, with malice aforethought, summoned Hoffa before the committee while the Grand Jury was meeting in order to deliberately influence the members of the Grand Jury. They are human beings. Couldn't they have had a closed hearing" (Tr. 147-148)? "Now when it comes to Sourwine, when it comes

to Adlerman—Sourwine was in charge of the Senate Security Committee—of this Communism business. We have information that this was a plot between him and members of the Department of Justice in order to subpoena Mr. Hoffa at that particular time. And the same with Adlerman. Hoffa was subpoenaed in January, 1961, to appear before the Senate Committee" (Tr. 150).

Three newspapermen were subpoenaed to document, on the receiving end, that the flow of bile originated from within the Government. They were Willard Kiplinger, editor of the *Kiplinger Newsletter;* John Hunt, editor of the *Insider's Newsletter;* and John Herling, editor of *John Herling's Labor Letter.* For example, the *Insider's Newsletter* reported on October 2, 1964, nine days before the grand jury came in with the indictment, as follows: "Insiders report that Jimmy Hoffa will shortly be reindicted in the Florida land case on charges of mis-use of Teamster Pension Funds. The judge threw out the first indictment when the composition of the Grand Jury was challenged" (Tr. 26). An even worse example from the same paper: "Justice Department was in touch with AFL-CIO. During its debate last week on whether to readmit Hoffa's Teamsters to the organization, the Department predicted Hoffa's indictment and argued that if the AFL-CIO would put the Teamsters out, protection and support would be given to Teamster Locals that revolted against Hoffa" (Tr. 28-29).

Petitioners sought to examine these newspapermen under oath as to the sources of this "inside information". Their record for accuracy goes well beyond simple guesswork. It is patent that they did receive information from persons within the Government.

Subpoenas were also issued at petitioners' behest to obtain the testimony of persons to establish that the indictment was based upon evidence obtained unlawfully by wiretapping and mail watch. It was in this connection that subpoenas were served upon several post office officials. This also underlay in part the subpoenas to the Senate of-

ficials since the Senate Committee has admitted to having and using wiretap information, under the euphemism of "refreshers", against petitioner Hoffa. But the primary thrust of subpoenas was toward proving the deliberate and concerted effort by Government officials to produce a running fire of prejudicial news headlines before and during the grand jury's deliberations.

The decision of the District Court to quash all the subpoenas of Government officials, rendered orally from the bench, did not give any independent reasons: "I think that the motions to quash should be granted in each of these cases on the grounds stated in the motions and the arguments that we have had here rather extensively. I have listened to the whole thing and I feel that the grounds are well taken to each one of them, and I think the subpoenas in each one of them ought to be quashed" (Tr. 178).

Earlier the District Court had quashed the subpoenas to Kiplinger and Hunt, apparently on the ground it makes no difference whether they got information from official sources or not (Tr. 38). The subpoena to Herling was quashed the following week, on March 14 (Tr. 926). The lower court accepted the Government's bold contention that an official campaign of villification is not a proper subject of inquiry in a criminal prosecution of the victim of the campaign.

Petitioners noted an appeal from the orders of Judge Lieb to the Court of Appeals for the Fifth Circuit. The notice of appeal was filed on March 19, 1962. On April 11, 1962, the District Court granted an application for an extension of time for docketing the appeal and filing the record on appeal to May 31, 1962.

On May 3, 1962, the Government filed, in the Court of Appeals, a Motion to Dismiss the Appeal forthwith (1a).[3] Accompanying the motion was a brief for the United States (2a-9a).

3. Page references with the suffix "a" are to the Appendix to the Petition for Writ of Certiorari.

Petitioners filed an Answer to the Motion to Dismiss the Appeal (10a-24a). The Answer incorporated petitioners' legal argument.

On June 1, 1962, without having heard oral argument, the Court of Appeals filed an order granting the Government's motion on the ground that the orders quashing the subpoenas duces tecum and ad testificandum are not "final decisions" within the contemplation of 28 U. S. C. § 1291. The appeal was dismissed (25a).

A timely petition for rehearing was filed (26a-27a). The Government countered with a reply (28a-31a). The petition for rehearing was denied on July 12, 1962 (32a).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Fifth Circuit, holding that it lacked jurisdiction to hear petitioners' appeal, is clearly of importance in the administration of federal law. Section 1291 of the Judicial Code provides that a Court of Appeals shall have jurisdiction from all "final decisions" of the District Courts of the United States. The issue in this case is the interpretation of the final decision requirement.

There is a well-established doctrine that treats certain collateral orders of a District Court as "final" for purposes of Section 1291, even though further issues remain to be resolved between the parties. It is in the area of collateral orders that this appeal falls.

This Court has spoken on the matter of the appealability of collateral orders in only a few cases. The landmarks, of course, are *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949); *Swift & Co. v. Compania Caribe*, 339 U. S. 684 (1950); and *Stack v. Boyle*, 342 U. S. 1 (1951). The meaning of these cases was stated as follows in the Brief of the United States in the recent case of *Parr v. United States*, 351 U. S. 513 (1956):

"We understand *Cohen*, *Swift* and *Stack* do establish these principles: 'An order that does not "termi-

> nate an action", but is, on the contrary, made in the course of an action, has the finality that par. 1291 requires for appeal if (1) it has "a final and irreparable effect on the rights of the parties", being "a final disposition of the claimed right", (2) it is "too important to be denied review"; and (3) the claimed right "is not an ingredient of the cause of action and does not require consideration with it".' See *United States v. Cefaratti*, 202 F. 2d 13, 16 (C. A. D. C.); certiorari denied, 345 U. S. 907." (Brief for United States, pp. 44-45)

The Government's brief in support of its Motion to Dismiss the Appeal in the court below did not attempt to distinguish any of these landmark cases. Indeed, the Government did not cite a single one. See Appendix, pp. 2a through 9a.

Petitioners earnestly maintain that their appeal fits within the principles of *Cohen*, *Swift* and *Stack*, as the Government itself has enunciated them. The claimed right is bottomed on the Fifth Amendment to the Constitution, wherein it is provided that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. Necessarily this means a fair and impartial grand jury, not an extension of the office of the Attorney General. The ultimate issue in this proceeding is whether Government officials can use their high places to create a climate of opinion so biased as to affect the deliberations of a grand jury. Surely no one would deny the fundamental importance of such a question.

The claimed right, further, is not an ingredient of the criminal charge and does not require consideration with it. Petitioners are charged with use of interstate facilities for the purpose of defrauding others. Obviously, the merit or lack of merit in the criminal charge has no bearing on the extent to which high Government officials may have influenced the grand jury. The issue presented now is wholly

independent and completely separable from the charges in the indictment.

The case here is thus distinguished from *DiBella v. United States*, 369 U. S. 121 (1962), decided by this Court last Term. *DiBella* held that decisions on motions to suppress evidence were not final for purposes of appeal. The opinion of the Court noted that such motions "depend upon factual contentions that may be more appropriately resolved at a plenary trial." *Id.* at 128. "[A]ppellate intervention makes for truncated presentation of the issues of admissibility, because the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light." *Id.* at 129. This Court found a close interrelationship between motions to suppress evidence and trial on the merits, precisely because the subject of the motions to dismiss was evidence of guilt or innocence.[4] No such relationship exists here. The plenary trial, obviously, has nothing whatever to do with a propaganda campaign designed to deprive petitioners of a fair and impartial grand jury.

All the principles of *Cohen*, *Swift* and *Stack* are present. In so far as the proceedings in the District Court are concerned, there has been a final disposition of petitioners' claimed right. This cannot be renewed at the trial. The claimed right is plainly not an ingredient of the cause of action and does not require consideration with it. Finally, it is an issue too important to be denied review.

It is manifestly of widespread and general importance that this Court elaborate and clarify the principles deemed applicable in the appealability of collateral orders. This Court did so in *DiBella* with respect to the motions to suppress evidence. As the decision of the court below and the

4. The cases cited and relied upon by the Government in the Court of Appeals (7a-8a) are likewise all cases in which the evidence sought was directed toward and relevant only to the ultimate merits of a pending controversy. They are thus in the same category as *DiBella*.

argument of the Government indicate, there remains great need for further consideration by this Court.

2. The unusual circumstances of this prosecution make it especially important not to put off full consideration of the legal consequences of a Government inspired campaign of villification designed to influence grand jury proceedings. That question ought to be resolved finally before trial of the merits of the pending indictment.

There are several reasons for this. In the first place, the issue of misconduct by members of the executive and legislative branches of the Government is obviously more basic to the quality of justice administered in the Federal system than the particular criminal violation asserted in the indictment against petitioners. No one today can be unaware of the fundamental questions raised in our society where trial by news media is such a frequent occurrence. The evils in this are multiplied several times over when the prosecution undertakes to instigate and manipulate this propoganda machine for its own ends.

Secondly, the trial of the pending indictment promises to be extraordinarily protracted. The District Court, in its opinion denying petitioners' motion to dismiss the indictment, noted with respect to the forthcoming trial:

> ". . . it was represented by counsel for both sides that the trial of this cause would involve an enormous amount of documentary evidence as well as a large number of witnesses and that said witnesses' testimony in most instances would involve the application of the Jencks rule, Title 18, U. S. C. A., § 3500, thereby necessitating frequent interruption of the trial." (Memorandum Opinion of District Judge Lieb, *United States v. Hoffa*, No. 1282 Orl. Cr., May 23, 1962.)

Elsewhere, the District Court noted that the Government had identified, for pretrial inspection by defendants, documents numbering in excess of 300,000 that the prosecution would introduce in its case in chief. The District Court

scheduled a pretrial conference in an effort to deal with the "enormity of the problems involved" in litigation of this scope. It is absolutely clear that the proposed trial will be several months or longer in duration.

By comparison, the latest published Report of the Director of the Administrative Office of the United States Courts shows that, in the entire country, last year there were only eight criminal cases that lasted more than 30 days. Only three cases lasted more than 60 days. Two of the three, significantly, were mail fraud prosecutions. Table C 9, *Annual Report of the Director of the Administrative Office of the United States Courts 1961*, p. 263.

If petitioners are correct in their contention that an indictment secured through deliberately engendered, inflammatory propaganda is defective, the trial of the merits of the indictment would be futile. With the dockets of the Federal courts in the congested condition seen today, it is grossly inexpedient to proceed with a trial that will last several months on an indictment as questionable as this one. The appropriate time to resolve the issue of the validity of this indictment is now, before the trial of the charges in the indictment.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
CHARLES E. DAVIS,
FISHBACK, WHITAKER, DAVIS,
DOMINICK AND TROUTMAN,
Attorneys for Petitioner
James R. Hoffa.

O. B. CLINE, JR.,
Attorney for Petitioner
Robert E. McCarthy, Jr.

Appendix.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 19581

JAMES R. HOFFA AND ROBERT E. McCARTHY, JR.,
Appellants

v.

UNITED STATES OF AMERICA
Appellee

NOTICE OF MOTION.

To: Charles E. Davis, Attorney for
Appellant James R. Hoffa
170 East Washington Street
Orlando, Florida
and
O. B. Cline, Jr., Attorney for
Appellant Robert E. McCarthy, Jr.
1518 Alfred I. DuPont Building
Miami 32, Florida

PLEASE TAKE NOTICE that the United States of America hereby moves this Honorable Court to dismiss the appeal in this cause forthwith.

JAMES T. DOWD,
James T. Dowd,
Special Assistant to the
Attorney General,
United States Department of Justice.

MARIE L. McCANN,
DAVID S. RITTER,
EUGENE M. GRIMMIG,
Special Attorneys,
United States Department of Justice,
Of Counsel.

BRIEF FOR THE UNITED STATES OF AMERICA IN SUPPORT OF MOTION TO DISMISS APPEAL.

STATEMENT

Appellants and one other were indicted by a grand jury in Orlando, Florida, on December 7, 1960. Subsequently, on July 12, 1961, the indictment was dismissed on motion of defendants, on the ground that the grand jury was improperly selected and constituted.

On October 11, 1961, a second indictment was returned against appellants (the third defendant having departed this life on August 27, 1961) and they were arraigned to the indictment on October 19, 1961. At that time, the District Court gave defendants until December 1, 1961 to file motions. Replies were filed by the Government and on January 9, 1962, the District Court set the motions down for hearing on February 26, 1962. Subsequently, on motion of appellant McCarthy, the date for hearing was adjourned to March 12, 1962.

Commencing about February 27, 1962 through March 14, 1962, the final day of the hearing, defendants attempted to garner witnesses for their cause.

Included among those served were James T. Dowd, Special Assistant to the Attorney General, and the attorney in charge of the Government's case; William P. Rogers, former Attorney General of the United States; Frank Hogan, District Attorney of New York County; John L. McClellan, Senior Senator from Arkansas; Julien Sourwine, Chief Counsel to the Senate Internal Subcommittee of the Committee on the Judiciary; Jerome S. Adlerman, Chief Counsel to the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations; Henry Montague, Chief Postal Inspector; Robert F. Kennedy, Attorney General of the United States; Arthur L. Goldberg, Secretary of Labor; Willard M. Kiplinger,

Editor of the Kiplinger Washington Newsletter; John Hunt, Editor of the Insider's Newsletter; and others.

On March 9, 1962, the district court entered an order granting written motions by the Government to quash the subpoenas served upon J. P. Boesler, Postal Inspector, Orlando, Florida; Baxter A. Watts, Supervisor of Postal Zone No. 2, Post Office Station No. 10, Detroit, Michigan; Henry Montague, Chief Postal Inspector, Washington, D. C.; Julien G. Sourwine, Chief Counsel to the Senate Internal Security Subcommittee of the Committee on the Judiciary, Washington, D. C.; Jerome S. Adlerman, Chief Counsel to the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, Washington, D. C.; Honorable John L. McClellan, United States Senate, Washington, D. C.; Arthur L. Goldberg, Secretary of Labor, Washington, D. C.; and by Willard Kiplinger, Editor of the Kiplinger Newsletter, Washington, D. C.; and by John Hunt, Editor of the Insider's Newsletter, New York City, to quash the subpoenas served upon them.

In the same order, the district court also granted oral motions by the Government to quash subpoenas served upon Robert F. Kennedy, Attorney General of the United States, Washington, D. C.; and John Siegenthaler, his Administrative Assistant.

On March 14, 1962, the district court entered an order quashing a subpoena served upon John Herling, Editor of John Herling's Labor Letter, Washington, D. C.

A notice of appeal from these two orders was filed on March 19, 1962, and on April 11, 1962, the district court granted an application by appellants for an extension of time for docketing their appeal and filing the record on appeal to May 31, 1962.

ARGUMENT

The Appeal Should Be Dismissed for Lack of Jurisdiction

> "[Interlocutory appeals] are generally, pariahs in the federal judicial system. * * * As opposed to a judicial system where every technical slipup may be instantly appealed and will be automatically held to be fatal, ours is one in which correction is not ordinarily possible until the conclusion of the litigation, at which time only the seriously prejudicial defects will be dignified by appellate attention." *Perkins v. Endicott Johnson Corporation*, 128 F. 2d 208, 211, 212 (2d Cir. 1942), aff'd 317 U. S. 501 (1943).

Since appeals are not a matter of right, but of grace, and the avoidance of piecemeal appeals is a fundamental concept of our system of jurisprudence,[1] appeals in federal matters, with some few exceptions not pertinent here,[2] are therefore limited to those provided for in Title 28, United States Code, Section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

What constitutes a final judgment in a criminal case has long since been established:

---

1. *Cobbledick v. United States*, 309 U. S. 323, 324, 325 (1940); *Parr v. United States*, 351 U. S. 513, 518, rehearing den. 352 U. S. 859 (1956); *Heike v. United States*, 217 U. S. 423, 429 (1910); *Catlin v. United States*, 324 U. S. 229, 233, 234 (1945); *Gilmore v. United States*, 264 F. 2d 44, 47 (5th Cir.), cert. den. 359 U. S. 994, rehearing den. 360 U. S. 914 (1959); *Atlantic Fishermen's Union, etc. v. United States*, 195 F. 2d 1021, 1023 (1st Cir. 1952); *Di Bella v. United States*, 369 U. S. 121, 124 (1962).

2. See, *e.g.*, 28 U. S. C. 1292. As the Supreme Court stated, in *Di Bella v. United States*, 369 U. S. 121, 126 (1962), "Every statutory exception is addressed either in terms or by necessary operation solely to civil actions."

> "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation . . . on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" *Berman v. United States*, 302 U. S. 211, 212, 213 (1937).[3]

And the courts will not permit circumvention of this rule of finality. As far back as 1828, Chief Justice Marshall, in denying a motion for a writ of mandamus directed to the circuit court for the District of Columbia, pointed out that:

> "If this motion could now prevail, it would be a plain evasion of the provision of the act of congress, that *final* judgments only should be brought before this court for re-examination * * * The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this court many times, before there would be a final judgment." *Bank of Columbia v. Sweeny*, 1 Pet. 567, 569.

See *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 27-30, 32 (1943); *Gilmore v. United States*, 264 F. 2d 44, 47 (5th Cir.), cert. den. 359 U. S. 994, rehearing den. 360 U. S. 914 (1959).

And the Supreme Court, in *Di Bella v. United States*, 369 U. S. 121, 126 (1962), said that:

> ". . . [T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law. The Sixth Amendment guarantees a speedy trial."

---

3. See *St. L., I. M. & S. R. R. Co. v. Southern Ex. Co.*, 108 U. S. 24, 28, 29 (1883); *Bostwick v. Brinkerhoff*, 106 U. S. 3, 4 (1882); *Grant v. Phoenix Ins. Co.*, 106 U. S. 429, 430, 431 (1882); *Catlin v. United States*, 324 U. S. 229, 233 (1945); *Parr v. United States*, 351 U. S. 513, 518, rehearing den. 352 U. S. 859 (1956); *United States v. Knight*, 162 F. 2d 809, 810 (3d Cir. 1947).

Appellants, by filing appeals from the district court's orders quashing their subpoenas, are attempting to do just what Chief Justice Marshall condemned—evade a provision of an act of Congress. The litigation in this matter is nowhere near a decision terminating it on the merits.

Since a denial by the district court of appellants' motions to dismiss the indictment would clearly not be appealable at this stage of the proceedings,[4] it is difficult to see how, under the most strained construction of 28 U. S. C. § 1291, and the cases decided thereunder, orders granting motions to quash subpoenas issued in connection with a hearing on these motions to dismiss, can be transformed into final decisions, reviewable by this court.

In any event, it is settled that orders granting or denying the issuance of subpoenas or quashing those issued are not appealable. The rationale of these cases is perhaps best set forth in *Alexander v. United States*, 201 U. S. 117 (1906). The Supreme Court dismissed appeals from orders directing appellants to comply with a subpoena duces tecum and said at page 121:

> "In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal."

And in *Cobbledick v. United States*, 309 U. S. 323, 325 (1940), the Supreme Court, in affirming the dismissal of

4. See, *e.g.*, *Cherton v. United States*, 256 F. 2d 576 (6th Cir. 1958); *United States v. Golden*, 239 F. 2d 877, 878 (2d Cir. 1956); *Kyle v. United States*, 211 F. 2d 912, 914 (9th Cir. 1954); *United States v. Foster*, 278 F. 2d 567, 569 (2d Cir.), cert. den. 364 U. S. 834 (1960); *Atlantic Fishermen's Union v. United States*, 197 F. 2d 519, 520 (1st Cir. 1952); *Conway v. United States*, 142 F. 2d 202, 203 (9th Cir. 1944); *United States v. Tiplitz*, 202 F. 2d 60 (3d Cir. 1953).

appeals from the denial of motions to quash grand jury subpoenas duces tecum, said:

> "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice."

The reasoning of the *Alexander* and *Cobbledick* cases has been applied to the granting of motions to quash subpoenas or the denial of motions for their issuance.

See, *e.g.*, *United States v. Tinkoff*, 153 F. 2d 106 (7th Cir. 1945), cert. den. 329 U. S. 740 (1946) (Order denying petition for subpoenas duces tecum for Attorney General and United States Attorney to perpetuate their testimony in connection with petition for writ of error coram nobis not final and therefore not appealable); *United States v. Schlotfeldt*, 136 F. 2d 935, 940 (7th Cir. 1943), cert. den. 327 U. S. 781 (1946) (Order denying petition for subpoenas duces tecum for heads of State Department, Selective Service System of Tulsa, Oklahoma, and Federal Bureau of Investigation not appealable); *Palmer v. Fisher*, 228 F. 2d 603, 606 (7th Cir. 1955), cert. den. 351 U. S. 965 (1956) (Order quashing subpoena duces tecum for deposition in connection with proceeding in Southern District of Florida interlocutory); *Marion v. United States*, 164 F. 2d 158, 159 (9th Cir.); mandamus den. sub nom. *Marion v. Foley*, 164 F. 2d 490 (1947); conviction aff'd 171 F. 2d 185 (1948), cert. den. 337 U. S. 944 (1949) (Order denying motion for subpoena ad testificandum and duces tecum in connection with motion for new trial not final); *Tucker v. Peiler*, 297 Fed. 570, 572 (2d Cir.), cert. den. 265 U. S. 587 (1924) ("An order entered denying or granting a petition for a writ of subpoena under the statute may be the legitimate exertion of judicial authority in a case or controversy, but it is not of such finality as to make it reviewable here on appeal."); *Thomas*

French & Sons v. International Braid Co., 146 F. 2d 735, 737 (1st Cir. 1945) ("It is well settled that an order granting or denying a subpoena duces tecum for records and documents of a party bearing upon issues relevant in a pending action is not appealable.").

The fact that appellants attempt to raise constitutional issues in their designation of points on appeal does not help them. In *Gilmore v. United States*, 264 F. 2d 44 (5th Cir.), cert. den. 359 U. S. 994, rehearing den. 360 U. S. 914 (1959), a case involving an appeal from an order of a new trial following a jury disagreement in which the defendant urged double jeopardy, this Court said, at pages 46 and 47:

> "The Constitution does not guarantee an appeal. That comes wholly from the statute. There are many instances in which it is ultimately determined that constitutional rights have been violated. But the nature of the asserted right, i.e., a constitutional one, does not distinguish appellate review of any such question from the assertion of other rights, whether statutory or common law, or from a procedural rule. At least so long as a criminal case is pending, review of such matters . . . must await the trial and its outcome."
>
> • • •
>
> "The Constitutional right, or the asserted violation of it does not bridge the gap of appellate statutory jurisdiction. Nor, for like reasons, does it, through some reverse process, expand the term 'final decision' into something which, contrary to a long-settled Congressional policy amounts in actuality to piecemeal review."

See *Cobbledick v. United States*, 309 U. S. 323, 325, 326 (1940); *Dugan & McNamara v. Clark*, 179 F. 2d 118, 120 (3d Cir. 1948).

It is clear, therefore, that this court is without jurisdiction to entertain an appeal in the case at bar from the district court's interlocutory orders granting the motions

to quash the subpoenas issued by appellants in connection with the hearing on their motions to dismiss the indictment now pending against them. The orders in question are so clearly not final within the meaning of 28 U. S. C. § 1291 that the attempted appeal is obviously frivolous. *Atlantic Fisherman's Union v. United States*, 197 F. 2d 519, 520 (1st Cir. 1952).

CONCLUSION

For the foregoing reasons, the appeal must be dismissed.

Respectfully submitted,

JAMES T. DOWD,
James T. Dowd,
Special Assistant to
the Attorney General,
United States Department of Justice.

MARIE L. MCCANN,
DAVID S. RITTER,
EUGENE M. CRIMMEL,
Special Attorneys,
United States Department of Justice,
Of Counsel.

JAMES T. DOWD, the undersigned and Attorney for the United States of America, hereby certifies that true and correct copies of the attached Notice of Motion, Motion to Dismiss Appeal, and Brief for the United States of America in Support of Motion to Dismiss Appeal, have been mailed to Charles E. Davis, Esq., 170 E. Washington Street, Orlando, Florida, attorney for the defendant, James R. Hoffa; and O. B. Cline, Jr., 1518 Alfred I Dupont Building, Miami 32, Florida, attorney for the defendant, Robert E. McCarthy, Jr., on the 3rd day of May, 1962.

JAMES T. DOWD,
James T. Dowd.

ANSWER TO MOTION TO DISMISS APPEAL.

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

COMES NOW THE APPELLANT JAMES R. HOFFA and respectfully submits that the Government's motion to dismiss the appeal in this cause should be either denied or postponed until the hearing on the appeal.

Full understanding of the facts underlying the pending appeal are absolutely essential to a determination of the question of this Court's jurisdiction. The motion filed by the Government is virtually devoid of the salient facts on which this appeal was based. It is submitted respectfully that the jurisdictional question that has been raised ought to be postponed until the record has been prepared and the briefs of both sides filed.

The Government, however, has given notice of motion to dismiss forthwith. In deference to this Court, and notwithstanding the short time permitted by the unexplained urgency of the Government's action, defendant submits the following statement and argument in opposition to the motion to dismiss the appeal.

STATEMENT

Appellants James R. Hoffa and Robert E. McCarthy, Jr., stand indicted in the District Court for the Southern District of Florida with fifteen substantive counts of violations of 18 U. S. C. par. 1341 and 1343. The indictment contains a sixteenth count charging conspiracy to violate the same provisions of the penal code.

The indictment was returned by a grand jury in Orlando, Florida, on October 11, 1961. This is the second indictment against these defendants in this district. The previous indictment, which contained twelve substantive counts, was returned by the grand jury on December 7, 1960. On motion by the defendants, strenuously opposed

by the Government, this indictment was dismissed by the District Court for gross irregularities in the process for selection of the grand jury. *United States v. Hoffa*, Criminal No. 1241, Orlando, July 12, 1961. The Government did not take an appeal from this decision despite its position in the District Court that the defendants' motion was spurious and utterly lacking in any basis whatsoever.

Defendants filed motions to dismiss the second indictment and for other relief. These motions were based upon several grounds, including the contention that defendants were deprived of a fair and impartial grand jury through the conscious and deliberate instigation of propaganda hostile to defendant Hoffa by officials of the Executive and Legislative Branches of the United States Government. The precise allegation is found in paragraph 11 of the motion to quash the indictment:

> "To dismiss the indictment on the ground that the Grand Jury which returned the indictment was neither fair or impartial, in that:
>
> "(a) said Grand Jury was biased and prejudiced as a result of exposure to widespread defamatory and inflammatory publicity nationally and locally through newspapers, radio and television, prior to and during the selection of the Grand Jury, and the representation to it of the evidence against the Defendant during its deliberations.
>
> "(b) The said Grand Jury was biased and prejudiced as a result of exposure to widespread defamatory and inflammatory publicity deliberately engendered by public statements and acts of various officials in the Justice Department and members of the Cabinet and Senate Committee, and other persons acting in concert with them, prejudicial to Defendant, prior to and during the selection of the Grand Jury, the presentation to it of the evidence against the Defendant, and during its deliberations . . .

"(c) The said Grand Jury was biased and prejudiced against the Defendant as a result of the statement by the President of the United States over a nationally and locally televised and radio broadcast, which was also published in local daily newspapers, when a candidate for the presidency, in substance as follows: "I am not satisfied to see men like Hoffa be free," and by the appointment of the President's brother as Attorney General of the United States, who has, on many occasions, issued public statements and writings all of which biased and prejudiced the Grand Jury."

The Government's response to this charge of deliberate attempts by high Government officials to influence the actions of the grand jury in deliberating on whether to indict defendant Hoffa is nothing short of amazing. *The Government did not deny this allegation.* Neither in its written response nor orally to the District Court has the Government ever denied that inflammatory publicity was intentionally engendered. The entirety of the Government's response has been limited to an assertion, incredible in light of the raging torrent of propaganda, that there is no showing that the campaign of villification succeeded. The Government asserts, at the pleading stage, that there is an "absolute failure" to show that the grand jurors were "in fact biased and prejudiced." The Government asked that the charge of wilful misconduct should be denied without a hearing.

The Government's position appears, in short, to be this; it is perfectly proper for the President, the Attorney General, other Cabinet members, influential Senators, and other high officials of the Government to connive to deprive a person of a fair and impartial grand jury. Defendant maintains that, where a studied campaign is disclosed of the proportions found in this case, the burden is upon the Government to prove that its efforts did not succeed. No

such showing has been made by the Government in this case. None could be made.

The District Court did not, as suggested by the Government, deny a hearing. A hearing was scheduled for February 26, 1962. Subsequently, the date was changed to March 12, 1962.

Not content to rely on the allegations of deliberate Government instigation of hostile publicity, even in light of the absence of any denial by the Government, defendant prepared to prove by direct evidence that the public statements of high Government officials about the defendant were made with knowledge of the pending grand jury proceedings. Defendant further prepared to prove that the running fire of anti-Hoffa publicity that rose to a crescendo during and immediately prior to the convening of the grand jury was deliberately instigated by Government officials. A broad variety of incidents were manufactured to capture headlines.

Toward this end, sometimes with considerable difficulty, defendant served subpoenas upon high Government officials in the present and past administrations. In every case, these subpoenas sought to have the individual come and testify. In many instances, the subpoenas also sought to have the individual named bring documents or other materials with him. Subpoenas were also served upon publishers of newsletters in which had appeared much of the anti-Hoffa material with special notation that the sources were Government insiders.

Not surprisingly, the Government moved to prevent defendant from putting the testimony of these officials on the record. A motion to quash the subpoenas was filed by the special prosecutor with respect to the Government officials. Private counsel followed suit for the publishers. These motions to quash came on for a hearing before Judge Leib on March 9, 1962, the Friday before the scheduled hearing on the motion to dismiss the indictment.

The District Court heard argument from counsel from both sides, as well as counsel for the publishers. Defendant is unclear as to the precise basis or bases for the motions to quash. Counsel for the Government vaguely argued that the subpoenas were untimely, oppressive and irrelevant. The latter apparently stems from the Government's legal view that it is all right for Government officials to mount a calculated campaign to villify a person they intended to accuse of crime. Such a campaign, in their view, is not relevant in the criminal proceeding. The meaning of "untimely" was never revealed. The same is true of "oppressive". These matters go to the merits of the issues raised on this appeal and need not be explored here.

On behalf of defendant, counsel made an offer of proof as to the testimony expected to be elicited from the persons under subpoena. It is impossible in this memorandum to set forth fully the nature of these matters. The transcript of this matter covers nearly two hundred pages. However, it is possible to give illustrations from statements of counsel to demonstrate the effort to establish the deliberate quality of the inflammatory and prejudicial running fire of publicity.

On the subpoena to Attorney General Robert F. Kennedy, counsel stated: "The Attorney General has been deliberately fomenting inflammatory publicity . . . Mr. Kennedy has made public statements that he wants to see Mr. Hoffa rot in jail, that he has got enough evidence to convict him, giving out information to many people." Transcript (hereinafter Tr.) 129-139. Counsel also referred to the book published by Robert F. Kennedy in 1960, *The Enemy Within*, which contains much sensationalized and unwarranted and untrue assertions about the defendant (Tr. 156). There was a republication of the prejudicial material from the Kennedy book in a volume called *Crusade Against Crime*, bearing the grateful acknowledgment of the publisher for the chapter on the de-

fendant to the Attorney General's administrative assistant (Tr. 170-171, 185-188; see also Tr. 153).

On the subpoena to the Secretary of Labor, Arthur Goldberg, counsel stated: ". . . I say it is one of the most vicious things that any Executive Officer has ever done in the country, especially one of those whom they say might become one of the Justices of the United States Supreme Court and why do I say that? Here is an individual and a week before the Grand Jury meets issues a statement, a public statement . . . in which he says that Mr. Hoffa, words to that effect, is not fit to be a leader upon the basis of what he has discovered in the Labor Department . . . A short time afterwards he makes a speech to the graduating class of the Federal Bureau of Investigation agents . . . he says the President and the Attorney General see eye to eye with me that Hoffa is no good, and now, using colloquialisms, or words to that effect, which is publicized." (Tr. 131-132). Counsel added: "He has no right to say anything like that. He knows there is a case pending in court, he knows there are deliberations." (Tr. 133).

Counsel also referred to other headlines manufactured by Secretary Goldberg when he spoke to the Transport Workers Union convention. "Goldberg told the delegates to the TWU Convention . . . that the Department had 'found on the basis of evidence adduced that the Teamsters leadership did not comport itself according to the ethical standards of the labor movement.'" (Tr. 135).

Counsel further indicated that he intended to prove that Secretary Goldberg planned with the leaders of the AFL-CIO to have their convention called while the Grand Jury was deliberating in order to produce additional headlines hostile to Hoffa. "I will show when we get Mr. Goldberg on the stand, I will show that he plotted with Mr. Meaney, that the convention was called at a certain time, that they had big headlines, 'AFL-CIO says Hoffa corrupt', all during this particular time when the Grand Jury was meeting." (Tr. 137).

On the subpoena to John Siegenthaler, Administrative Assistant to Attorney General Kennedy, counsel declared: "We have information and we expect to be able to prove that he has been the person who has been deliberately giving out this business to the newspapers, to the columnists, to the inside letters, [redacted] the Kiplinger." (Tr. 170). Siegenthaler is also the person who received the acknowledgment of the publisher in connection with the republication of the Attorney General's wild swinging attack on defendant, under the heading of "Jimmy Hoffa vs. The F.B.I." (Tr. 171).

Similar issues arise with respect to legislative officials. Subpoenas were served on Senator John L. McClellan of Arkansas; Julien Sourwine, Chief Counsel to the Senate Internal Security Subcommittee of the Committee on Judiciary; and Jerome B. Adlerman, Chief Counsel to the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations. Defendant maintains that it was not by coincidence that, at the time the Grand Jury was deliberating, legislative investigations were publicly conducted in order to try to prejudice defendant. Council referred to one resulting headline: "Senate group to probe union deal. Hoffa faces quiz about Reds," dated October 6, 1961 (Tr. 147). The indictment was returned October 11, 1961.

Counsel for defendant represented to the District Court: "Now, we say that they deliberately and viciously and, with malice aforethought, summoned Hoffa before the committee while the Grand Jury was meeting in order to deliberately influence the members of the Grand Jury. They are human beings. Couldn't it have waited until after the indictment? Couldn't they have had a closed hearing?" (Tr. 147-148). "Now when it comes to Sourwine, when it comes to Adlerman—Sourwine was in charge of the Senate Security Committee—of this Communism business. We have information that this was a plot between him and members of the Department of Justice in

order to subpoena Mr. Hoffa at that particular time. And the same with Adlerman. Hoffa was subpoenaed in January, 1961, to appear before the Senate Committee" (Tr. 150).

Three newspaper men were subpoenaed to document on the receiving and that the flow of file originated from within the Government. They were Willard Kiplinger, editor of the Kiplinger Newsletter; John Hunt, editor of the Insider's Newsletter; and John Herling, editor of John Herling's Labor Letter. For example, the Insider's Newsletter reported on October 2, 1961, nine days before the Grand Jury came in with the indictment, as follows: "Insiders Report that Jimmy Hoffa will shortly be re-indicted in the Florida land case on charges of mis-use of Teamster Pensions Funds. The judge threw out the first indictment when the composition of the Grand Jury was challenged" (Tr. 26). An even worse example from the same paper: "Justice Department was in touch with AFL-CIO. During its debate last week on whether to readmit Hoffa's Teamsters to the organization, the Department predicted Hoffa's indictment and argued that if the AFL-CIO would put the Teamsters out, protection and support would be given to Teamster Locals that revolted against Hoffa" (Tr. 28-29).

The Kiplinger paper reported that the "Government is intensifying its drive to get him (Hoffa). The Justice and Labor Departments are investigating some new leads" (Tr. 32).

Defendant sought to examine these newspaper men under oath as to the sources of this inside information. Their record for accuracy goes well beyond simple guesswork. It is patent that they receive information from persons within the Government. Defendant insists that this intentional leakage of prejudicial and inflammatory matter by Government officials deprived him of a fair and impartial grand jury.

Subpoenas were also issued at defendant's behest to obtain the testimony of persons to establish that the in-

dictment was based upon evidence obtained unlawfully by wiretapping and mail watch. It was in this connection that subpoenas were served upon several post office officials. This also underlay in part the subpoenas to the Senate officials since the Senate Committee has admitted to having and using wiretap information, under the euphemism of "refreshers", against defendant. But the primary thrust of subpoenas was toward proving the deliberate and concerted effort by Government officials to produce a running fire of prejudicial news headlines before and during the grand jury's deliberations.

The decision of the District Court to quash all the subpoenas of Government officials does not give any independent reasons: "I think that the motions to quash should be granted in each of these cases on the grounds stated in the motions and the arguments that we have had here rather extensively. I have listened to the whole thing and I feel that the grounds are well taken to each one of them, and I think the subpoenas in each one of them ought to be quashed" (Tr. 178).

Earlier the District Court quashed the subpoenas to Kiplinger and Hunt, apparently on the ground it makes no difference whether they got information from official sources or not (Tr. 38). The subpoena to Herling was quashed the following week, on March 14. The lower court seems to have accepted the Government's bold contention that an official campaign of villification is not a proper subject of inquiry in a criminal prosecution of the victim of the campaign.

ARGUMENT

1. The Orders of the District Courts Quashing the Subpoenas Were Final Decisions.

The Government has moved to dismiss the appeal for lack of jurisdiction on the theory that the orders of the District Court quashing the subpoenas for appellant's witnesses are interlocutory. By way of general introduction, the Government makes the truly remarkable assertions that appeals are not a matter of right, but of grace, that interlocutory appeals are generally pariahs in the federal judicial system, and so forth. What is especially remarkable about this "stage setting" is that the Government has so frequently and so vehemently and so recently taken exactly the opposite position. Last year, for example, the Government appealed a suppression of evidence order to this Court, in *United States v. Koenig*, 290 F. 2d 166 (5th Cir. 1961), and after losing here, petitioned for certiorari to the Supreme Court, which affirmed this Court, 369 U. S. 121 (1962). There was no talk of pariahs or appeals being a matter of grace in those Government documents. There ought to be some limit to the "two faced" character of Government advocacy before the courts.

Contrary to the style of the Government argument, the issue of this Court's jurisdiction of this appeal does not turn upon shibboleths. The question ultimately requires knowledge of and analysis of the particular facts and legal issues that are presented by this appeal. It is for that reason that appellant urges this Court to postpone consideration of the jurisdictional question until it has heard the merits of the appeal.

Nowhere in the Government's argument is there even a suggestion that they recognize the well established doctrine that treats certain collateral orders of a District Court as final for purposes of 28 U. S. C. par. 1291, even though further proceedings remain to be resolved between the par-

ties in the District Court. The landmark cases are *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949); *Swift & Co. v. Compania Caribe*, 339 U. S. 684 (1950); and *Stack v. Boyle*, 342 U. S. 1 (1951). The meaning of these cases was aptly stated by the Government itself in its brief in *Parr v. United States*, 351 U. S. 513 (1956), where the Government declared:

> "We understand *Cohen*, *Swift* and *Stack* to establish these principles: 'An order that does not "terminate an action" but is, on the contrary, made in the course of an action, has the finality that par. 1291 requires for appeal if (1) it has "a final and irreparable effect on the rights of the parties", being "a final disposition of the claimed right", (2) it is "too important to be denied review"; and (3) the claimed right "is not an ingredient of the cause of action and does not require consideration with it".' See *United States v. Cefaratti*, 202 F. 2d 13, 16 (C. A. D. C.), certiorari denied, 345 U. S. 967." (Brief for United States, pp. 44-45)

The Government's argument in the present case does not discuss these cases, does not even cite to any one of them.

Appellant contends that, under the doctrine of *Cohen*, *Swift* and *Stack*, the orders of the District Court were final and are appealable. The entire issue raised by appellant's attack upon the Government is collateral to the prosecution. Appellant has charged that officials in high places in the United States Government have deliberately and concertedly waged a campaign to villify him in the public mind in order to prevent him from having a fair and impartial hearing on the criminal charges that the Government was then pressing against him. This is a serious charge of wilful misconduct that is not an ingredient of the criminal charge and does not require consideration with it.

It is, moreover, an important matter, too important to be denied review. We have here the spectacle of leaders

of the United States Government deliberately fomenting hostile propaganda against an individual whom they hope to destroy with a criminal prosecution. These men do not deny that they have wilfully built the fires of prejudice and intentionally fanned the flames. Through their counsel, however, they seek immunity from having to testify about their actions with not a shred of legal justification for their claimed immunity other than the vague assertions that it would be unreasonable and oppressive to make them testify. No substantiation was ever offered for these generalizations other than that these people occupy high office. Yet, it is precisely because of the prominence of their positions that it is so vitally important to preserve at least a minimal standard of decency and fair play. As long as the President, members of the Cabinet and the Senate and others in a position of influence maintain the right to instigate a running fire of prejudicial publicity, designed deliberately to deprive an individual of fair judicial proceedings, there exists an important issue worthy of appellate review.

Finally, the orders of the District Court quashing these subpoenas is a final and irreparable disposition of appellant's right to prove the wilful and deliberate quality of the actions of these people. This question is not going to arise again at the trial. It is totally independent of and unaffected by the question of guilt or innocence of the appellant on the indictment for mail fraud. It is fairly severable from the context of the larger litigation.

The most recent decision of the Supreme Court in this area of appealable collateral orders, *DiBella v. United States*, 369 U. S. 121 (1962), fully supports appellant's contention that this Court has jurisdiction to entertain the appeal here. The Supreme Court, in *DiBella*, held that decisions on motions to suppress evidence were not final. Mr. Justice Frankfurter's opinion for the Court canvassed the field of law on the question of finality of decisions. At the outset he declared that "the procedural aspects of law deal

with the practical affairs of men and do not constitute an abstract system of doctrinaire notions." *Id.* at 124. He made clear that the motions to suppress evidence "depend on factual contentions that may be more appropriately resolved at a plenary trial." *Id.* at 128. "(A)ppellate intervention makes for truncated presentation of the issues of admissibility, because the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light." *Id.* at 129.

The present appeal does not deal with "a potential item of evidence in a forthcoming trial." *Id.* at 129. It concerns matters that will not affect or be affected by the decision on the merits of the indictment. It is "fairly severable from the context of a larger litigious process." *Id.* at 127.

The Supreme Court in *DiBella* emphasized the aim to achieve simplicity and efficiency and fairness as a guideline in weighing appealability of a collateral order. The Court quoted Rule 2 of the Federal Rules of Criminal Procedure as counselling construction of the Rules "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." In most instances, perhaps, appeal of a collateral order does not advance these aims. Here, on the other hand, it is agreed on all sides that the pending trial of the indictment would last months. The Government proposes to introduce thousands of documents, the admission of which will alone take countless hours. If appellant is correct that high Government officials cannot manipulate public opinion to influence judicial proceedings, such a trial would go for naught. It would impose on the defendants, on the Government and on the courts a lengthy, burdensome and unnecessary trial. The unjustifiable expense would be enormous. If, as the Supreme Court declares, procedural rules deal with practical affairs of men, it is manifest that this Court has jurisdiction of this appeal.

A word needs to be said about the Government's doctrinaire argument and collection of cases to the effect that the granting or denying of motions to quash subpoenas is not an appealable order. All of the cases cited involved subpoenas to bring forth evidence on the merits of pending litigation and are indistinguishable from the problem of the motion to quash in the *DiBella* and *Koenig* cases. This is true in *United States v. Schlotfeldt*, 136 F. 2d 935 (7th Cir. 1943); in *Palmer v. Fisher*, 228 F. 2d 603 (7th Cir. 1955); in *Marion v. United States*, 164 F. 2d 158 (9th Cir. 1947); in *Tucker v. Peiler*, 297 Fed. 570 (2d Cir. 1924); and in *Thomas French & Sons v. International Braid Co.*, 146 F. 2d 735. It is also true of the Government's remaining case, *United States v. Tinkoff*, 153 F. 2d 106 (7th Cir. 1945), where a prisoner was apparently planning but had not yet instituted a coram nobis proceeding and sought meanwhile to perpetuate the testimony of the Attorney General and a United States Attorney. In every one of the cited cases, unlike the present appeal, the evidence sought was directed toward and relevant only to the merits of the pending controversy. Here the evidence relates to conduct of Government officials, who are in effect on trial for deliberate efforts to abuse the judicial process, not to the guilt or innocence of appellant of mail fraud.

Appellant respectfully submits that the orders of the District Court granting immunity from having to testify to the persons subpoenaed is a final and appealable order.

2. If This Court Determines That the Orders of the District Court Are Not Final, the Appeal Should Be Treated as a Petition for Mandamus.

Should this Court reject appellant's contention that the orders of the District Court are final and appealable, the Court should consider the contentions advanced as a petition for writ of mandamus. Such a procedure is clearly proper. *Steccone v. Morse-Starrett Products Co.*, 191 F. 2d 197 (9th Cir. 1951); *Shapiro v. Bonanza Hotel Co.*, 185 F. 2d 777 (9th Cir. 1950). While the papers are not labelled petition for mandamus, substance should prevail over form.

This Court has held that mandamus does not lie unless there is no adequate remedy by appeal. *Ex parte Deepwater Exploration Co.*, 260 F. 2d 546 (5th Cir. 1958). If appellant has no adequate remedy by appeal, this is certainly an appropriate case for the remedy of mandamus. *LaBuy v. Howes Leather Co.*, 352 U. S. 249 (1957).

Respectfully submitted,

CHARLES E. DAVIS,
FISHBACK, WILLIAMS, DAVIS & DOMINICK,
170 East Washington Street,
Orlando, Florida,
Attorney for Defendant,
James R. Hoffa.

I DO CERTIFY that a true copy of the foregoing has been served by mail upon Mr. James T. Dowd, United States Department of Justice, Washington, D. C. this 18th day of May, 1962.

CHARLES E. DAVIS

OPINION ON MOTION TO DISMISS.

Before TUTTLE, *Chief Judge*, and RIVES and WISDOM, *Circuit Judges.*

BY THE COURT:

It appearing that this appeal is from orders of the United States District Court for the Southern District of Florida granting motions by the Government to quash subpoenas duces tecum and ad testificandum, and it appearing that such orders are not "final decisions" within the contemplation of Title 28 U. S. Code, Section 1291,

IT IS NOW ORDERED that the motion of the United States to dismiss the within appeal is hereby granted and the appeal is DISMISSED.

Dated: June 1, 1962

(*Original Filed: June 1, 1962*)

PETITION FOR REHEARING AND, ALTERNATIVELY, A MOTION TO STAY ISSUANCE OF MANDATE.

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

I.

COME NOW THE APPELLANTS, JAMES R. HOFFA and ROBERT E. MCCARTHY, JR., and respectfully pray the Court to grant a rehearing of this cause, and/or alternatively, to stay the issuance of mandate, upon the following grounds:

(1) The Court's order in the above case is in conflict with *Raphael Company v. Maharam Fabrics Corp.*, 283 F. 2d 310 (C. A. 7, 1960), in which an order granting a motion to quash service was held to be appealable. It also is in conflict with the *United States v. Guterma*, 272 F. 2d 344 (C. A. 2, 1959), in which an order denying a motion to quash a subpoena was held appealable.

(2) The Court's order in this case did not discuss Appellants' contention that in the event the order of the District Court was not regarded as final and appealable that the Court should consider the contentions advanced as a petition for writ of mandamus.

Recently the Supreme Court of the United States in *Dairy Queen v. Wood*, 369 U. S. 469, 8 L. ed. 2d 44, at page 48 stated:

> "Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeal to grant mandamus where necessary to protect the constitutional right to trial by jury . . . ."

A Constitutional right to secure evidence, fortified by Rule 17 of the Federal Rules of Criminal Procedure, likewise should compel the granting of mandamus.

WHEREFORE, for the reasons assigned and for other reasons appearing in Appellants' main brief, the Appellants

respectfully pray that the Court reconsider its decision and grant a rehearing of this appeal prayed for herein.

Respectfully submitted,

CHARLES E. DAVIS,
170 East Washington Street,
Orlando, Florida,
Attorney for James R. Hoffa.

We certify that this petition for rehearing is filed in good faith and not filed for the purpose of delay.

II.

Alternatively, Appellants' Motion for Stay of Mandate should be granted in the event that the foregoing petition for rehearing is denied since these Appellants propose to file in the Supreme Court of the United States a petition for writ of certiorari.

Accordingly, Appellants pray that if rehearing is denied, the mandate of this Court be stayed, conditioned on the timely filing of their petition for certiorari and pending the disposition thereof by the Supreme Court.

Respectfully submitted,

CHARLES E. DAVIS,
170 East Washington Street,
Orlando, Florida,
Attorney for James R. Hoffa.

I do hereby certify that a true copy of the foregoing Petition has been served by mail this 15th day of June, 1962, upon Mr. James T. Dowd, United States Department of Justice, Washington, D. C.

CHARLES E. DAVIS,
170 East Washington Street,
Orlando, Florida,
Attorney for James R. Hoffa.

GOVERNMENT'S REPLY TO PETITION FOR REHEARING AND/OR TO STAY ISSUANCE OF MANDATE.

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

Comes now the United States of America in opposition to petition of appellant James R. Hoffa[1] for rehearing on the Government's motion to dismiss the appeal in this cause, granted by this Court by order dated June 1, 1962, and/or to stay the issuance of mandate, and respectfully shows to this Honorable Court the following:

(1) The Petition for Rehearing Should Be Denied.

(a) The cases cited by appellant in paragraph one of his brief are inapposite. *United States v. Guterma*, 272 F. 2d 344 (2nd Cir. 1959), was an appeal from an order denying a motion to quash a grand jury subpoena duces tecum calling for production of personal books and records of the defendant in the custody of a third party. The issue of appealability of the order was apparently not before the court.[2] The factual situation in *Guterma* bears no resem-

1. Robert E. McCarthy, Jr., represented by O. B. Cline, Jr., filed a notice of appeal, but did not file any opposition to the Government's motion to dismiss the appeal. Charles E. Davis, Jr., signed the petition for rehearing in his capacity as attorney for James R. Hoffa, although the cover of the petition recites that he represents both Hoffa and McCarthy. Should this court consider McCarthy a party to this proceeding, this memorandum applies equally to him.

2. In footnote 1, p. 344, the court noted, "The order is appealable . . .", citing cases constituting an exception to the rule of *Cobbledick v. United States*, 309 U. S. 323 (1940). Where documents not in the custody of the owner are subpoenaed, the owner is powerless to refuse to produce them, thereby precluding a final order holding him in contempt, from which an appeal can be taken. In effect, the *denial* of a motion to quash *in such a situation* constitutes a final disposition of his rights. See *Perlman v. United States*, 247 U. S. 7 (1918); *Cobbledick v. United States*, 309 U. S. 323 (1940).

blance to the facts of the case at bar. See Government's Motion to Dismiss Appeal and supporting Brief.

Edwin Raphael Company v. Maharam Fabrics Corp., 283 F. 2d 310 (7th Cir. 1960), does not deal with the question of subpoenas. In that case, the court dismissed and finally disposed of, a civil diversity suit for improper service of summonses upon a party. This order terminating the litigation was clearly appealable. *Edwin Raphael Company* does not conflict with the order entered by this court, nor does it relate in any way to the question decided by this court.

(b) Appellant relies in his second point upon the failure of this Court to discuss in its order his contention that the appeal should be treated as a petition for a writ of mandamus, as a ground for rehearing. Clearly this is without merit. Appellant filed no motion for leave to file a petition for mandamus and did not take this position until the Government had moved to dismiss the appeal as interlocutory. Then, for the first time, by way of alternative answer to the Government's motion to dismiss, he asked this Court to so treat his appeal. There was therefore no need for a discussion of the question of mandamus.

Moreover, the substantive relief of mandamus is not available to him in this situation. See *Roche v. Evaporated Milk Assn.*, 319 U. S. 21 (1943). *Dairy Queen v. Wood*, 369 U. S. 469 (1962), cited by appellant, reversed the Court of Appeals' denial of mandamus on the ground that its action was ". . . inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions" (p. 470). Equally clear from the prior decisions of the Supreme Court is the prohibition against piecemeal appeals. *Cobbledick v. United States*, 309 U. S. 323 (1940). The case at bar falls squarely within the rationale of the *Cobbledick* and *Roche* cases, and mandamus can not issue.

(2) The Issuance of Mandate Should Not Be Stayed.

Appellant has not shown a conflict between Circuits on the question before this Court. No recognized ground for certiorari review is therefore presented. See Rule 38, paragraph 5(b), Supreme Court Rules. In view of this, and the fact that mandamus would not lie, appellant has failed to show any justification for a stay of mandate. See *English v. Cunningham*, 361 U. S. 905, 907 (1959) (application for stay of mandate denied); *Rosenberg v. United States*, 346 U. S. 273, 288 (1953) (stay of execution of sentence vacated); *Virginia Petroleum Job. Assn. v. Federal Power Com'n.*, 259 F. 2d 921, 925 (D. C. Cir. 1958) (application for stay of mandate denied).

Conclusion.

Appellant's petition for rehearing and/or a stay of mandate should be in all respects denied for the reasons set forth hereinabove.

Respectfully submitted,

/s/ James T. Dowd,
James T. Dowd,
Special Assistant to the Attorney General United States Department of Justice.

Marie L. McCann,
David S. Ritter,
Eugene M. Grimmig,
Special Attorneys
United States Department of Justice.
Of Counsel.

JAMES T. DOWD, the undersigned and attorney for the United States of America, hereby certifies that true and correct copies of the attached Memorandum in Opposition to Motion for Leave to File Petition for Writ of Mandamus have been mailed to Charles E. Davis, Esq., 170 E. Washington Street, Orlando, Florida, attorney for the defendant, James R. Hoffa; O. B. Cline, Jr., 1518 Alfred I. Dupont Building, Miami 32, Florida, attorney for the defendant, Robert E. McCarthy, Jr.; and the Honorable Joseph F. Lieb, Respondent, Post Office Building, Tampa, Florida.

JAMES T. DOWD.
James T. Dowd.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 19,581

JAMES R. HOFFA AND ROBERT E. McCARTHY, JR.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ORDER ON PETITION FOR REHEARING AND ALTERNATIVELY, A MOTION TO STAY ISSUANCE OF MANDATE.

Before TUTTLE, *Chief Judge*, RIVES and WISDOM, *Circuit Judges.*

BY THE COURT:

The petition for rehearing is hereby DENIED.

The alternative motion for a stay of the issuance of the mandate is also DENIED.

Dated: July 12, 1962.